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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT MITCHELL KELLER  
and DANA LAMAR OFFLEY,

Defendants and Appellants.

B199617

(Los Angeles County  
Super. Ct. No. VA 092410)

APPEALS from judgments of the Superior Court of Los Angeles County.  
John A. Torribio, Judge. Affirmed as modified.

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Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant Robert Mitchell Keller.

Janyce Keiko Imata Blair, under appointment by the Court of Appeal, for Defendant and Appellant Dana Lamar Offley.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Susan Sullivan Pithey, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendants of murder, attempted murder and shooting at an occupied vehicle. Defendants' appeals are directed at their sentences. We affirm the sentences with certain modifications.

### **BACKGROUND**

The jury convicted Dana Offley of the second degree murder, and Robert Keller of the first degree murder, of Alejandro Barrales. It convicted both defendants of the willful, deliberate and premeditated attempted murder of Pedro Portillo and of firing at an occupied vehicle.

The jury found that both defendants committed the crimes for the benefit of a criminal street gang.

With respect to the murder, the jury found as to both defendants that a principal personally discharged a firearm proximately causing death. The jury also found that defendant Offley personally and intentionally discharged a firearm proximately causing death.

With respect to the attempted murder charge, the jury found that Offley personally and intentionally discharged a firearm proximately causing great bodily injury. It did not find that a principal discharged a firearm causing great bodily injury. The jury found as to Keller that a principal personally and intentionally discharged a firearm proximately causing great bodily injury. The jury was not asked to make a finding whether Keller *personally* discharged a firearm proximately causing great bodily injury and it did not do so.

The trial court sentenced Offley to a term of 15 years to life for the second degree murder and 15 years to life for the attempted murder. It enhanced both sentences with terms of 25 years to life for personally discharging a firearm proximately causing death or great bodily injury. The court imposed and stayed a 5-year sentence for shooting at an occupied vehicle. It did not impose sentence on the gang enhancement.

The court sentenced Keller to a term of 25 years to life for the first degree murder plus an enhancement of 25 years to life for committing a crime for the benefit of a

criminal street gang in which a principal personally discharged a firearm proximately causing death plus another 25 years to life for the street gang enhancement. For the attempted murder, the court sentenced Keller to life in prison plus 25 years to life for the firearm enhancement. It did not impose the gang enhancement on the attempted murder charge. The court imposed and stayed a 5-year sentence for shooting at an occupied vehicle.

Offley contends that the firearm enhancement imposed on his murder conviction should be reversed because there was insufficient evidence to prove that he personally discharged a firearm proximately causing the death of Barrales.

Keller argues the court erred in imposing the street gang enhancement on his murder conviction because the jury did not find that he personally discharged a firearm proximately causing death.

The People dispute Offley's contention, agree with Keller's contention and also maintain each defendant should be ordered to pay an additional \$40 in court security fees.

## **DISCUSSION**

### **I. OFFLEY'S APPEAL**

We need not decide whether there was sufficient evidence that Offley personally and intentionally discharged a firearm proximately causing the death of Barrales. As we shall explain, under the sentencing scheme for crimes using guns and committed for the benefit of a criminal street gang, the Penal Code required the trial judge to enhance Offley's sentence by 25 years to life regardless of whether he personally discharged a firearm proximately causing death so long as a principal discharged a firearm proximately causing death.

Penal Code section 186.22, subdivision (b)<sup>1</sup> requires a sentence enhancement for "any person who is convicted of a felony committed for the benefit of, at the direction of,

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<sup>1</sup> All statutory references are to the Penal Code.

or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members[.]”

Section 12022.53, subdivision (d) states: “(d) Notwithstanding any other provision of law, any person who, in the commission of a felony . . . personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life.”

Section 12022.53, subdivision (e)(1) states: “The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: (A) The person violated subdivision (b) of section 186.22 [committing a crime for the benefit of a street gang]. (B) Any principal in the offense committed any act specified in subdivision . . . (d) [discharging a firearm proximately causing death].”

Sections 186.22, subdivision (b) and 12022.53, subdivisions (d) and (e) combine to produce the following result. If Z. violates section 186.22, subdivision (b) by committing a crime for the benefit of a street gang, the 25 years to life enhancement under section 12022.53, subdivision (d) (which would otherwise apply only if Z. *personally* discharged a firearm proximately causing death or great bodily injury) is made applicable to Z. by section 12022.53, subdivision (e)(1)(A), (B) if “[a]ny *principal*” in the crime discharged a firearm proximately causing death or great bodily injury. (Italics added.)

Here, the jury found that Offley murdered Barrales for the benefit of a street gang and that a principal personally discharged a firearm proximately causing Barrales’ death. Offley does not challenge either of these findings. Accordingly, under sections 186.22, subdivision (b), 12022.53, subdivisions (d) and (e)(1) Offley was subject to the 25 years to life enhancement whether or not he personally discharged a firearm proximately causing Barrales’ death.

## II. KELLER'S APPEAL

Keller maintains that as to the murder conviction the trial court should not have imposed the gang enhancement in addition to the firearm enhancement. The Attorney General concedes that such an enhancement would not be proper under the facts of this case. He contends that the minute order mistakenly included the enhancement although it was not imposed by the judge, and suggests that we strike the enhancement to correct the minute order. We agree with the Attorney General.

Section 12022.53, subdivision (e)(2) states: “An enhancement for participation in a criminal street gang . . . shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, *unless the person personally used or personally discharged a firearm in the commission of the offense.*” (Italics added.) Here, the jury found that Keller committed the murder for the benefit of a street gang but it did not find that he personally used or discharged a firearm in the commission of the offense, only that a principal did so. Keller does not challenge the court’s imposition of the 25-year enhancement pursuant to section 12022.53 subdivision (e)(1) based on a principal using a firearm (see discussion of Offley’s appeal, above), and we agree that the court correctly imposed that enhancement. Having imposed the firearm enhancement under section 12022.53, subdivision (e)(1), however, the court could not, in addition, impose the section 186.22 gang enhancement unless Keller personally used or discharged a firearm. The jury was not asked to make a finding whether Keller personally discharged a firearm proximately causing great bodily injury and did not do so. Accordingly, the gang enhancement could not be imposed. The transcript of the proceedings indicates that the court was aware of this limitation and did not impose the gang enhancement but the minute order and abstract of judgment state otherwise. We will strike the gang enhancement.

## III. COURT SECURITY FEE

The trial court imposed a \$20 court security fee on each defendant under section 1465.8, subdivision (a)(1). The People argue that the court should have imposed an

additional \$40 in court security fees on each defendant. Neither defendant responded to the People's argument and it appears correct. The statute states that the court shall impose a \$20 court security fee "on every conviction for a criminal offense." Each defendant was convicted of three criminal offenses: murder, attempted murder and shooting at an occupied dwelling. Therefore, each defendant should have been assessed a \$20 fee for each conviction for a total of \$60 each.

### **DISPOSITION**

As to Offley, the judgment is modified to impose two \$20 court security fees. In all other respects, the judgment is affirmed.

As to Keller, the judgment is modified by striking the gang enhancement and imposing two \$20 court security fees. In all other respects, the judgment is affirmed.

The trial court is directed to prepare respective abstracts of judgment accordingly and forward certified copies of the corrected abstracts to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

DUNNING, J.\*

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\* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.